No. 05-259

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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April 7, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF

Respondent Sheila White advances the extraordinary claim that an employer is subject to liability under § 704 of Title VII for *any* different and adverse treatment of a Title VII complainant, no matter how trivial or temporary. As both BNSF and the United States point out, White's position cannot be squared with the language, structure, or policies of the statute as a whole. Sections 703 and 704 are most naturally interpreted *in pari materia*. Each prohibits the same kind of discriminatory conduct, but creates a different form of protected class. Petr. Br. 14-21; U.S. Br. 7-12. Under both sections 703 and 704, the employer may be held liable (outside of hostile work-environment claims) only for "an official act of the enterprise" that causes "a significant change in employment status." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998). Under that standard, White concedes that "it is far from certain that respondent would prevail." Resp. Supp. Br. 1. Her concession is an understatement; none of the conduct at issue remotely satisfies the *Ellerth* standard.

1. White argues that the entire meaning of § 704 resides in two words: "discriminate against." She urges that those two words mean, in isolation, any adverse "'difference in treatment or favor,'" and thus employers incur Title VII liability for even the most trivial of acts by an employer's agent. Resp. Br. 5, 9. White unabashedly declares that Congress "chose[] to make a 'federal case' out of even minor acts of retaliation," *id.* at 15, for "all that the statute requires . . . is that the retaliatory act be 'against' the plaintiff." *id.* at 10.

White commits a cardinal error of statutory interpretation. This Court does not "construe statutory phrases in isolation," *United States* v. *Morton*, 467 U.S. 822, 828 (1984), but rather "'look[s] to the provisions of the whole law, and to its object and policy,'" *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989), to determine which among "permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest*

Assocs., Ltd., 484 U.S. 365, 371 (1988); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (Title VII text is to be interpreted in light of "the specific context in which that language is used, and the broader context of the statute as a whole").

Here, sections 703 and 704 are most naturally read *in pari materia*. Petr. Br. 14-21; U.S. Br. 7-12. White claims that Congress had to repeat *in haec verba* all of the "widely divergent language" of § 703 (Resp. Br. 14) in § 704 if it intended their prohibitions to be parallel. But "the natural inference is that Congress used the phrase 'discriminate against' [in § 704] as shorthand for the employment practices that it had previously identified as unlawful, if taken on the basis of race, color, religion, sex, or national origin." U.S. Br. 10. When (as here) closely related statutory provisions use the same terminology in shorthand form but without the same express limitations that appear in a preceding section, this Court has not hesitated to interpret the two statutes *in pari materia*, where that comports with statutory purposes.[1]

Not only does White give short shrift to interpreting the statute as a whole,[2] but also she effectively reads certain lan-

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[1] *See, e.g.*, *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-37 (2002); *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 545 (2002); *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976). "The negative pregnant argument should not be elevated to the level of interpretive trump card." *Field* v. *Mans*, 516 U.S. 59, 67 (1995).

[2] Her only nod in the direction of analyzing statutory structure is to argue that "Congress circumscribed the Title VII prohibitions with eleven specific statutory exceptions," and purportedly "[o]nly a single exception applies to practices otherwise forbidden by section 704(a)." Resp. Br. 10-11. As an initial matter, this is incorrect. A number of the statutory exceptions apply to claims of discrimination "under this subchapter," which includes § 704(a), thus strengthening the inference that §§ 703 and 704 are to be construed *in pari materia*. *See, e.g.*, 42 U.S.C. §§ 2000e-1(b), 2000e-2(f), (g), (h), (k)(2) & (3), (n). In any event, Congress's decision to carve out certain exceptions that apply to only one form of § 703 discrimination—such as the right of religious educational institutions to hire persons of that religion, *id.* § 2000e-2(e)(2)—says nothing about the

guage out of the statute altogether. Even though § 704 appears in a statute devoted exclusively to discrimination in employment and prohibits employers from engaging in "an unlawful employment practice" of discriminating against persons engaged in protected activity, 42 U.S.C. § 2000e-3(a), White insists that § 704 "does not require an 'employment action.'" Resp. Br. 12. White dismisses the statutory term "unlawful employment practice" as a meaningless catchall phrase because this same phrase in both sections 703 and 704 also applies to unions, employment agencies, and joint labor-management committees. *Id.* White ignores that the prohibited "unlawful employment practices" by those entities address not all discrimination (*e.g.*, discrimination by a union in selecting a contractor to construct a union hall), but only that affecting employment rights and privileges: *i.e.*, discrimination regarding union membership and practices, employment opportunities and referrals, employer dealings, employee training, and applicant selection and testing. 42 U.S.C. §§ 2000e-2(b)-(d) & (l), 2000e-3. "That common usage is a specific manifestation of Congress's intent to tie the scope of the retaliation prohibition to Title VII's core prohibitions." U.S. Br. 11. Indeed, this inference is strengthened by this Court's recent conclusion that "retaliat[ion] against a person *because* he complains of sex discrimination ... constitutes intentional 'discrimination' 'on the basis of sex.'" *Jackson* v. *Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1504 (2005) (Title IX).

Accordingly, nearly every court of appeals has rightly interpreted sections 703 and 704 in harmony, requiring that the plaintiff prove that employer discrimination constitutes a "'materially adverse change in the terms and conditions of plaintiff's employment.'" Pet. App. 10a (alteration omitted); *Robinson* v. *City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (Alito, J.). This Court should do the same.[3]

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meaning of the general prohibition on discrimination in either section 703 or 704.

[3] Respondent overreaches in claiming that *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), is to the contrary. Resp. Br. 12-13. *Robinson* held

2. White insists that this standard must be rejected because it is not "to be found in [the] text of section 704(a)." Resp. Br. 11. But Title VII has been consistently interpreted in light of its purposes and policies to prohibit only objectively serious forms of discrimination. Thus, in cases involving sexual and racial harassment alleged to cause only psychological harm, this Court decided that the harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment.'" *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986) (internal quotation marks and alteration omitted). The Court chose this standard because it "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The prevailing requirement of a materially adverse employment action likewise ensures that only objectively serious discrimination can give rise to liability.

3. White wrongly claims that her contrary construction is supported by other federal statutes. See Resp. Br. 20-23 & 1a-3a. White argues that, because there are 43 anti-retaliation statutes that use the phrase "discriminate against," and because those statutes "have the same salutary purpose" as Title VII, those other statutes demonstrate that § 704(a) operates "without limitation." *Id.* at 21-22.

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only that the term "employee" in Title VII includes former employees. 519 U.S. at 346; it did not opine on what employer conduct was necessary to find a violation of Title VII. *See Brazoria County, Tex.* v. *EEOC*, 391 F.3d 685, 692 (5th Cir. 2004). Indeed, *Robinson* reached that conclusion largely because only former employees would be entitled to a remedy for the ultimate change in employment status—namely, discharge. 519 U.S. at 342-43. *Robinson* is fully reconcilable with the adverse-employment-action standard. *See, e.g., Robinson*, 120 F.3d at 1301 n.15 (standard satisfied if "retaliatory conduct was related to his or her future employment and was serious enough to materially alter his or her future employment prospects or conditions").

White again evinces an unwillingness to examine the specifics of statutory language, structure, and policy. Some anti-retaliation statutes are on their face substantially broader than § 704(a). *E.g.*, 2 U.S.C. § 1317(a) ("[i]t shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against" an employee for engaging in protected conduct); 33 U.S.C. § 1367(a) ("[n]o person shall fire, or in *any other way* discriminate against" (emphasis added)). Other statutes are written less broadly, but have been given an expansive agency interpretation. Compare, *e.g.*, 42 U.S.C. § 5851(a)(1), with 29 C.F.R. §§ 24.1, 24.2(a). Yet, White would interpret 43 statutes (from the Sarbanes-Oxley Act to CERCLA) to be identical to Title VII, with no consideration for differences in texts, regulatory and judicial interpretations, and histories, much less their purposes.

Each statutory scheme is different. The NLRA, on which White places principal reliance, demonstrates the point. The NLRA's anti-retaliation provisions are much broader than § 704. The NLRA forbids the employer both "'(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in § 7 of the Act; .... [and] (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.'" *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 735 n.1 (1983) (original alteration omitted) (quoting 29 U.S.C. § 158(a)(1) and (4)). These provisions operate in tandem, as their broad language suggests, to

> guarantee that employees will be able to enjoy their rights secured by § 7 of the Act—including the right to unionize, the right to engage in concerted activity for mutual aid and protection, and the right to utilize the Board's processes—without fear of restraint, coercion, discrimination, or interference from their employer.

Id. at 735. Moreover, the NLRA is enforced administratively, not by civil action in court for compensatory and punitive damages and other relief. The NLRB, of course, is not bound

to interpret § 8(a)(4) consistently with Title VII, and has not done so; in questions arising under the NLRA, the Board is owed deference in defining discrimination "in light of [its] special competence in applying the general provisions of the [NLRA] to the complexities of industrial life." *Id.* at 742.[4] So too must Title VII be interpreted in light of its own language, structure, and purpose.

White's position is further refuted by the Americans With Disabilities Act. Like § 703(a) of Title VII, the ADA's primary anti-discrimination provision prohibits discrimination against protected-class members "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. The ADA's anti-retaliation provision not only prohibits discrimination against persons participating in enforcement proceedings (in parallel to § 704), but separately makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual" for having exercised ADA rights or assisted someone else in doing so. *Id.* § 12203(a) & (b). The separate prohibition against coercion, threats, intimidation, and interference in subsection 12203(b) makes clear that not every instance of differential treatment constitutes "discriminat[ion]" under subsection 12203(a). See *Brown* v. *City of Tucson*, 336 F.3d 1181, 1186-93 (9th Cir. 2003); *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208, 222-24 (2d Cir. 2001). Thus, many courts have properly held that § 12203(a) of the ADA (like § 704(a) of Title VII) refers only to retaliatory discrimination with regard to the terms and conditions of employment. *Mondzelewski* v. *Pathmark Stores*,

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[4] White's proposed standard is broader than the NLRB's construction of the NLRA. *See McKesson Drug Co.*, 337 N.L.R.B. 935, 936 (2002) (construing the prohibition on discrimination in section 8(a)(4) to require an "adverse employment action"); *Manor Care of Boynton Beach*, Case 12-CA-16227, 1998 WL 1984996 (N.L.R.B. Div. of Judges Apr. 17, 1998) ("It is logical that an 'adverse employment action' necessarily must affect job tenure or status, and affect it adversely.").

Inc., 162 F.3d 778, 788 (3d Cir. 1998); *Treglia* v. *Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002); *accord* U.S. Br. 15 n.3. White is wrong in claiming both that a prohibition of "discrimination" in federal retaliation statutes inevitably extends to any different and adverse treatment no matter how trivial,[5] and that the varying language, structures, histories, and policies of other federal statutes can be summarily ignored in favor of her policy preferences.

4. Not only is White's position at odds with the language and structure of Title VII as a whole, but her position is extreme and implausible. Her interpretation is so untenable that it is embraced by *none* of her amici (some of whom cling to the former, atextual EEOC deterrence standard that the United States has now disavowed, U.S. Br. 15 n.4). It defies belief that Congress intended any trivial differential treatment by a corporate agent to state a claim of discrimination under § 704, while it restricted employer liability for the most invidious forms of racial, ethnic, sex, and religious discrimination only to materially adverse actions affecting the terms and conditions of employment. Petr. Br. 17; U.S. Br. 14-15.

Nor is there force to White's rhetoric that giving § 704 its plain meaning would result in "judicially approved methods of retaliation." Resp. Br. 24. The same objection can be raised whenever a court finds congressional intent to restrict the conduct that is actionable. There is no presumption that whenever Congress passes a remedial statute, it seeks to eliminate every vestige of unwanted conduct. In forgoing or restricting a remedy, Congress takes into account the severity of the harms, the costs of regulation and litigation, the risks of overdeterrence, and the administrability of a standard. *Com-*

[5] White is also incorrect in asserting that "[v]irtually all of these [anti-retaliation] statutes" have no "limitation as to the type of retaliatory act." Resp. Br. 22. Some statutes, unlike § 704(a) and § 12203(a) of the ADA, do not have an antecedent provision (such as sections 703(a) and 12112(a)) upon which to rely, and therefore contain an explicit terms-and-conditions limitation. *E.g.*, 12 U.S.C. §§ 1441a(q)(1), 1790b, 1831j; 20 U.S.C. § 3608; 31 U.S.C. § 5328(a); 49 U.S.C. § 31105(a).

plete Auto Transit, Inc. v. *Reis*, 451 U.S. 401, 416 (1981); *Landgraf* v. *USF Film Prods., Inc.*, 511 U.S. 244, 286 (1994). So, here, no form of retaliation is "immunized" from Title VII by the correct standard. Absent a tangible employment action, Congress simply did not provide a federal claim unless the employer's conduct reaches a sufficient level of severity to create a hostile work environment altering the conditions of employment. Petr. Br. 32; U.S. Br. 13.

White's assurances that her standard would not open the floodgates of trivial litigation are unavailing. She trumpets the requirement that the agent must have discriminated "against" the plaintiff, but by her definition a claim may be brought to trial by anyone alleging that the supervisor or co-worker intended to treat the plaintiff adversely in any way—hardly a brake on frivolous litigation. Resp. Br. 17. White also suggests that the employer might have an agency defense if the offending co-worker or supervisor did not use agency authority and "was motivated only by personal pique." *Id.* But the converse is that in the common occurrences where the "hostile remarks, dirty looks, ostracism" and the like occur while the supervisor or co-worker is acting in the scope of employment (*e.g.*, distributing daily work tasks), or if they are intended to serve the purposes of the employer, Title VII liability will attach under White's theory. *Id.* This is contrary to this Court's admonition that Title VII does not create a "general civility code," *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Most significantly, decisions at the very core of daily supervisory responsibility—such as where employees will work, when lunch breaks will be taken, and which employee will do what tasks—will always be actionable under White's theory even though they cause no economic harm and are neither severe nor pervasive.

White next asserts that there is a pragmatic deterrent that many plaintiffs may face summary judgment on the question of fact of damage. Resp. Br. 18. But the proof requirement for nonpecuniary damage is not demanding; courts routinely

hold that testimony of the plaintiff alone without any medical evidence may suffice. *E.g.*, *Ledbetter* v. *Alltel Corp. Servs., Inc.*, 437 F.3d 717, 725 (8th Cir. 2006); cf. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). Thus, many plaintiffs will survive summary judgment by alleging *some* humiliation, distress, or fear of job insecurity caused by the alleged conduct.[6]

The severe dilution of the § 704 standard proposed by White would unduly harm employers and burden the federal courts. Even under the prevailing materially adverse employment action standard, § 704 retaliation claims nearly doubled from 1992 to 2005 at a time when § 703 claims were largely unchanged; approximately 30% or more of Title VII plaintiffs now file § 704 claims.[7] These statistics belie White's claim that the prevailing standard prevents vindication of legitimate claims—unless one accepts the fanciful notion that more than 30% of employers engage in retaliatory discrimination, and that the rate of such discrimination has more than doubled in the last decade. But, if this Court adopts an unprecedented national rule that any retaliatory act—even one fully remediated by higher management—can give rise to Title VII liability (and compensatory and punitive damages, and attorneys' fees), undoubtedly § 704 litigation will increase dramatically. Title VII plaintiffs are already adversarial to their employers and thus distrustful of their em-

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[6] White also doubts that many attorneys will take a case without the promise of large compensatory damages. Resp. Br. 19. But, given that practically any manifestation of a supervisor's or coworker's hostility because of the filing of a discrimination charge is an open-and-shut case of § 704 liability under White's theory, many attorneys will be happy to garner fees as a prevailing party and seek punitive damages—especially if, as is true here, the plaintiff is also litigating a § 703 claim against the employer.

[7] *See* EEOC, Charge Statistics FY 1992 Through FY 2005, *at* http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2006). The EEOC reports that section 704 claims are made on 26% of total charges, which are not limited to Title VII claims; a conservative proxy for the number of Title VII plaintiffs who file section 704 claims is the percentage of total charges that include a retaliation charge (30%). *Id.*

ployers' post-claim conduct. See *Jensen* v. *Potter*, 435 F.3d 444, 452 (3d Cir. 2006) ("some strain on workplace relationships is inevitable"). Some are also simply litigious. Plaintiffs often succeed in arguing that motive is a jury question, and thus it would be difficult to dispose of even the most frivolous claims by pretrial motion. Nearly every suit would have substantial settlement value. The Court should not adopt an open-ended standard inviting the boundless litigation that White (and her amici with their equally flawed "deterrence" standard) would embrace. Cf. *Domino's Pizza, Inc.* v. *McDonald*, 126 S. Ct. 1246, 1252 (2006) (making 42 U.S.C. § 1981 an "omnibus remedy for *all* racial injustice" would inappropriately "produce satellite section 1981 litigation of immense scope.").

5. The standard that should govern employer liability under sections 703 and 704 alike, except for hostile environment claims, is the tangible employment action standard in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998).[8] Under that standard, an employer may be liable for "an official act of the enterprise" that constitutes "*a significant change in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761, 762 (emphasis added). White objects (Resp. Br. 28-30) that the precise issue in *Ellerth* concerned vicarious employer liability for harassment claims, a point BNSF freely acknowledges. Petr. Br. 22. The salient point is that, in resolving that question, the Court restated and "import[ed]" the prevailing materially adverse employment action standard under federal

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[8] This Court coined the term "tangible employment action" to distinguish employment actions with "'adverse tangible, job consequences.'" *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 144 (2004) (quoting *Ellerth*, 524 U.S. at 747), from the intangible changes of work conditions caused by a hostile work environment. *Ellerth*, 524 U.S. at 752. Outside that context, the "tangible employment action" standard is the same as the materially adverse employment action standard. Pet. App. 10a n.1; *Davis* v. *Town of Lake Park, Fla.*, 245 F.3d 1232, 1239 (11th Cir. 2001).

law. 524 U.S. at 761. That standard should apply to claims under §§ 703 and 704 alike.

Much of White's analysis of *Ellerth* is an attack on this Court's standard. First, White insists that this Court's definition of "tangible employment action" is just "other language" in the opinion and not part of the holding. Resp. Br. 30. That is not so: The holding in *Ellerth* that an employer is liable for supervisory harassment culminating in a "tangible employment action," 524 U.S. at 765, obviously refers to the definition of that term previously given in the opinion and quoted above. In any event, it is not the precise holding, but this Court's explication of the standard, that is relevant here.

Second, White urges that this Court did not mean what it said in *Ellerth*, and that a "tangible employment action" broadly refers to any "actual exercise by a supervisor of his or her official authority in directing or affecting a subordinate." Resp. Br. 30. Although White needs such a standard to prevail, this Court did not equate "tangible employment action" with every directive or act of a supervisor within the scope of employment. Directing a subordinate to make a phone call or mail a letter is an exercise of official authority; it is not a tangible employment action within the meaning of *Ellerth*. That term, this Court said, refers to "a company act" that typically inflicts direct economic harm on the employee, is documented in company records, requires the imprimatur of the company and the use of internal processes, and is subject to higher management review and approval. *Ellerth*, 524 U.S. at 762.

The limited scope of the standard is confirmed by the conduct that this Court identified as outside the concept, such as a "demotion without change in pay, benefits, duties, or prestige," and "reassignment to [a] more inconvenient job." *Id.* at 761. Each of these is an exercise of official supervisory authority, but it is not a "tangible employment action." Furthermore, this Court emphasized that this standard applied not just to any change in employment status, but instead only to "*significant*" changes, including a "reassignment with *signifi-*

cantly different responsibilities, or a decision causing a *significant* change in benefits." *Id.* at 761 (emphasis added).[9]

White's last resort is to argue at length in her response (and in the extra pages to which she helps herself on the dubious claim of entitlement to a supplemental brief under this Court's Rule 25.5) that the *Ellerth* standard BNSF urges the Court to apply is impermissibly vague. Even overlooking the irony of such a criticism coming from a party who is arguing for no standard at all, or a standard based on the "restraint" of lawyers, White's attacks should go nowhere. Her contention that the term "status" presents many imponderables (Resp. Br. 37-40) is unavailing; that term is simply shorthand for the terms and conditions of employment, as distinct from any act of supervision. Nor is the word "significant" somehow hopelessly unworkable; judges and juries are asked all the time to make a finding of "significance" in determining criminal and civil liability.[10] Moreover, the same "problem" exists in the context of hostile environment harassment where the judge and jury must decide whether conduct is "abusive." That there may be some ambiguity in the standard is no reason to reject having any standard at all, as White proposes. See *Harris*, 510 U.S. at 24 (Scalia, J., concurring). Juries and courts will have no more difficulty, and probably less, determining whether a change in employment status is significant than in determining whether a work environment

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[9] White's reliance (Resp. Br. 30-31) on the Court's later use of the phrase "undesirable reassignment" in *Ellerth* is misplaced. The Court was simply giving a shorthand description of the language earlier in the opinion defining tangible employment action to include an adverse reassignment with a significant change in responsibilities.

[10] *See, e.g., Spector* v. *Norwegian Cruise Lines, Ltd.*, 125 S. Ct. 2169, 2177 (2005) (ADA defense requiring a showing that the plaintiff "would pose 'a significant risk to the health or safety of others'"); *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 570 (1999). For a small sample of federal statutes requiring fact findings of significance, *see, e.g.*, 12 U.S.C. § 1786(f)(1), 4631(a); 15 U.S.C. § 78u(d)(3)(B)(iii); 16 U.S.C. § 1371(a)(4)(C); 17 U.S.C. § 1201(b)(1)(B); 18 U.S.C. § 1033(a)(2); 19 U.S.C. § 1337(a)(3); 21 U.S.C. § 333(g)(1)(B); 33 U.S.C. § 1342(p)(2).

is "abusive."[11]

White's discomfort with the *Ellerth* standard is understandable. As she herself acknowledges, "it is far from certain that respondent would prevail" under that standard. Resp. Supp. Br. 1. Quite right; indeed, she clearly loses.

6. White's claim that she suffered a "significant change in employment status" when she was directed to perform track maintenance tasks that are the essential functions of her position rather than operate a forklift simply does not withstand scrutiny. The decision below rests on the fiction that BNSF "transferr[ed] White from her forklift operator job to a standard track laborer job," which is deemed a "demotion" to a "new position" requiring more arduous work and fewer qualifications. Pet. App. 25a. So do White's and the Government's arguments in support of the decision. White asserts that "forklift operator was a new job" and that she was "removed" from "the position of forklift operator." Resp. Br. 1. The Government (also citing only the opinion below, and not the record) insists that she was transferred from a "'forklift operator position'" to a "standard track laborer position." U.S. Br. 27. This is all doublespeak.

Respondent and her *amici* cannot simply erase basic and well-recognized distinctions between "duties," "jobs," and

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[11] Even if this Court declines to find that section 703 and 704 should be interpreted *in pari materia* for all purposes, it still must confront the question of what materiality standard best eliminates frivolous claims and comports with statutory purposes. Petitioner has explained why the amorphous, open-ended deterrence standard formerly advanced by the EEOC is flawed and unworkable. Petr. Br. 42-50. Even if respondent were correct that claims of nonworkplace retaliation by employer agents are independently actionable under section 704 and must be judged by a different standard, *see* Resp. Br. 12-13, no such conduct is at issue here. When employment-related actions are at stake, the *Ellerth* standard, which is rooted in objective and verifiable facts of employment (as opposed to jury speculation about psychological questions of probabilities of deterrence), *cf. Harris*, 510 U.S. at 24 (Scalia, J., concurring), captures the conduct that is most likely to have a substantial effect on Title VII enforcement.

"positions" that are fundamental not only to personnel management but also to the federal employment laws. *Duties* are the tasks that an employee may perform; "[a] *job* consists of related activities and duties" that form the unit of work; and "a *position* consists of different duties and responsibilities performed by only one employee." G. Bohlander & S. Snell, *Managing Human Resources* 92 (13th ed. 2004); see also R. Mathis & J. Jackson, *Human Resources Management* 160, 569-70 (11th ed. 2006) (defining "duty" and "job"). Forklift operation was one set of duties White performed for three months after being hired; her job at all times was Maintenance of Way Laborer; and she occupied the position of Maintenance of Way Laborer at the Tennessee Yard.

The distinction between the "duties" an employee may perform and the "position" she occupies is fundamental under federal employment law. An employer has an absolute prerogative in creating positions of employment (subject to any applicable duty of collective bargaining). The identity of the position that any employee holds is not an empty formalism; it defines the terms and conditions of employment and any rights against discrimination. Thus, under the ADA, as well as under Title VII, any plaintiff alleging discrimination in hiring, firing, promotions, or transfers must show that she is qualified for an actual position: *i.e.*, that she can "perform the essential functions of the *employment position* that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) (Title VII plaintiff alleging discrimination in hiring must show, *inter alia*, that he "was qualified for a job for which the employer was seeking applicants"). The relevant employment position must be an "existing position" that the employer has already created. *Donahue* v. *Consolidated Rail Corp.*, 224 F.3d 226, 230 (3d Cir. 2000) (Alito, J.); *Willis* v. *Pacific Mar. Ass'n*, 244 F.3d 675, 681 (9th Cir. 2001).[12]

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[12] *Robinson* v. *Sappington*, 351 F.3d 317 (7th Cir. 2003), *cert. denied*, 542 U.S. 937 (2004), cited by White as a case approved by this Court,

There is no basis in law for disregarding the employment position White actually occupied, and positing a different "position" based on a subset of tasks she performed for a relatively short period. See, *e.g.*, *Anderson* v. *Coors Brewing Co.*, 181 F.3d 1171, 1176-1177 (10th Cir. 1999) (rejecting the claim that an employee's position was narrowed from temporary production operator to can sorter just because she spent most of her time on that task). White operated the forklift for *three months* (from June to September, 1997, Pet. App. 3a-4a)—not every day but only a "majority of the time," and while spending "a good bit of . . . time" on track maintenance duties "on a regular basis from the time [she was] first employed," such as oiling and cleaning the switches on the hundred or so tracks in the Tennessee Yard, II Tr. 194-96.[13] It is simply ludicrous to argue that she held "a forklift operator position" and was "demoted" by Brown to "a standard track laborer position." A law firm associate may spend a significant amount of time in a given year reviewing documents, but that does not make the position one of "document review lawyer," and an employee or applicant could not show that he was qualified for the associate position if he could only review documents, and not perform other essential lawyer functions that an associate may be called upon to do. The Sixth Circuit's approach to identifying an employee's position would wreak havoc with federal discrimination law, and indeed with the employer community subject to Title VII.

Resp. Br. 31 n.43, does not support her claim. There, a judicial clerk was officially "transferred" to a position working for a different judge. 351 F.3d at 336. Even then, the Seventh Circuit declined to decide whether the transfer alone was a tangible employment action, citing the existence of other factors. *Id.* at 337 n.13. Here there was no transfer, and *Sapping-ton* does not hold that a mere change in a clerk's duties (from calendaring to filing) would be actionable.

[13] Respondent cites only her direct testimony that she "had never experienced working on the railroad tracks," Resp. Br. 2 & n.8 (quoting I Tr. 86-87). She is not entitled to ignore her testimony on cross-examination quoted above retracting that claim.

Once the fiction of "transfer" is exposed, it is clear that the alteration of White's duties does not meet the *Ellerth* standard. This was not "a *significant* change in employment status," because a change in job tasks within an existing position does not typically inflict direct economic harm on the employee or require the imprimatur of the company and the use of internal processes, nor is it generally documented in company records or subject to higher management review and approval. 524 U.S. at 761-62. While a "*reassignment* with significantly different responsibilities" would be actionable, *id.* (emphasis added), there was simply no reassignment here. Petr. Br. 25 & n.5; *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1164 (10th Cir. 1999) ("The 're' in 'reassignment" implies the presence of an existing assignment, *i.e.*, an existing job, that the person holds," and assignment to a new position) (construing ADA regulations).

Even if White's actual position could be ignored and the change in duties somehow deemed a "reassignment," she was not given "*significantly* different responsibilities," 524 U.S. at 761 (emphasis added). Being asked to perform track maintenance tasks that are core responsibilities of her job (and ones that by her own testimony she and others performed "on a regular basis," II Tr. 194-95), hardly shows a dramatic shift in responsibilities. Petr. Br. 28. White claims that track maintenance is harder and dirtier than forklift operation, but "reassignment to [a] more inconvenient job [is] insufficient" to create liability. *Ellerth*, 524 U.S. at 761.

White rejoins that *Ellerth* cannot have this meaning because Title VII should not permit task assignments on the basis of race or sex. Resp. Br. 33. BNSF fully agrees that any kind of workplace discrimination is deplorable, but Congress limited Title VII liability to more serious conduct that materially affects the terms and conditions of employment, *Meritor*, 477 U.S. at 67, in part to prevent undue intrusion upon management prerogatives. Petr. Br. 30-32. As "with any rule of law which attempts to reconcile fundamentally antagonistic social

policies, there may be occasional instances of actual injustice which go unredressed," but "that price [is] a necessary one to pay for the greater good." *Barr* v. *Matteo*, 360 U.S. 564, 576 (1959). The substantially heightened litigation risk arising from White's favored rule will chill employers in the exercise of the ordinary management prerogative of assigning work, forcing them to treat Title VII plaintiffs with kid gloves and shielding them from normal and legitimate management responses. That cannot be the result Congress intended.

7. Similarly unavailing is White's claim that her judgment can be sustained on the basis of the vacated suspension. White asks this Court to overrule a line of appellate court cases holding that "[a]n employer may cure an adverse employment action ... before that action is the subject of litigation," *Taylor* v. *Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003). Resp. Br. 40-42; *accord* U.S. Br. 25.[14]

That stance runs afoul of this Court's repeated admonition that Title VII "aims chiefly, 'not to provide redress but to avoid harm,'" *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 545 (1999), and that "the preferred means for achieving this goal" is "[c]ooperation and voluntary compliance." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Indeed, the rationale for limiting liability to "an official act of

[14] Respondent seeks to dodge BNSF's challenge on this score with the baseless claim that it is outside the question presented. Resp. Br. 44-46. She wrongly claims that BNSF now disclaims responsibility for the suspension. BNSF has never stated that Brown was not its agent in suspending White; our consistent position is that the suspension was not the employer's final decision on her discipline and thus not a tangible employment action. *Id.* at 44 n.54. Similarly, it is false to claim that BNSF is taking a new position that the initial discipline was a suspension pending investigation. That was the testimony at trial, and it is how White herself characterized the initial discipline in both the EEOC charge and the complaint in this case! Petr. Br. 33. Finally, her claim that there should have been factual determinations below on the meaning of the CBA is baffling. Contract construction is a question of law (*Goddard* v. *Foster*, 84 U.S. (17 Wall.) 123, 142 (1872)), and this issue relates to the legal questions of the applicability of *Ellerth*. These are not fact issues for the jury.

the enterprise, a company act" subject to management review is that these "are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control," *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004), and thus it is fair to the employer to impose liability if it does not correct such actions. But if the employer corrects and wholly vacates those actions, there can be no liability, for there would be no "*employer-sanctioned* adverse action *officially changing* her employment status or situation." *Id.* at 134 (emphasis added).

Indeed, in hostile work environment claims not involving tangible employment actions, this Court has recognized a defense to liability "if the employer exercise[s] reasonable care to prevent and correct promptly any sexually harassing behavior." *Ellerth*, 524 U.S. at 765. Where liability depends upon a tangible employment action—"a company act," *id.* at 762—the result should not differ when the company provides a mechanism for management to investigate the facts and review the supervisor's decision, and then renders the company's final decision *in favor* of the employee.

This is not a question of an employer gaining "immunity from liability from other forms of relief provided by Title VII," as White contends. Resp. Br. 42. The question here is what conduct can be the basis for liability; that conduct is BNSF's final decision on discipline. White is entitled to no relief at all for the conduct. Nor is the cure "partial" because BNSF did not top off the back pay with an allowance for White's claimed emotional distress. The question is whether the adverse employment action was cured. White's employment status was restored to the *status quo ante* when BNSF reinstated her with full back pay and expunged the suspension from her record.[15]

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[15] This interpretation of section 704 liability is buttressed by the unavailability of relief for such conduct under the original Civil Rights Act. The claim (U.S. Br. 26) that someone in White's circumstance could have brought an action for interest or injunction under the original Act is un-

Nor do this Court's statute-of-limitations cases suggest a contrary result; indeed, they support petitioner. Petr. Br. 36-38. The CBA plainly provides that an employee may file a request for investigation of discipline and "[*a*] *decision will be rendered by the Carrier* within 10 days after completion of the investigation." CBA R. 91(b)(5) (JA 57) (emphasis added). It is only after such decision—which is "the official act of the enterprise," *Ellerth*, 524 U.S. at 762—that an employee "dissatisfied" with the Carrier's "decision" would grieve it under the separate article governing grievances. CBA R. 91(b)(7)-(8) (JA 57). It is the AFL-CIO (Br. 15), not petitioner, that misleads the Court in claiming that a request for investigation is a grievance; the plain language of the agreement is to the contrary.[16]

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founded. *Loeffler* v. *Frank*, 486 U.S. 549, 557-58 (1988), holds only that prejudgment interest is available on a *judgment* of back pay, and no injunction could issue absent a showing that the employer is likely to repeat the violation. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102-03 (1983). The 1991 Civil Rights Act expanded available remedies for unlawful conduct, but did not create new actionable conduct. Petr. Br. 36; *cf. Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001) ("In 1991, ... Congress further expanded the remedies ....").

[16] The AFL-CIO is also wrong to contend that the BNSF agreement—which it quotes selectively—is substantially different from the CBA here and would not have resulted in suspensions without pay before the final decision on discipline after investigation. AFL-CIO Br. 15-16. That agreement specifically provides that an employee may be "held out of service" without pay pending investigation, BNSF CBA R. 40.B, G (Reply App.); "[a] decision shall be rendered within thirty (30) days following the investigation," *id.* 40.D; and (in the part omitted by the AFL-CIO) an employee may file a grievance contesting that decision under the separate Rule 42 governing grievances, *id.* 40.H, 42. As relevant here, the Frisco and BNSF CBAs differ only in that in the former the employee requests the investigation, and in the latter it happens automatically unless waived. *See id.* 40.F. Thus, the industry norm, AFL-CIO Br. 15-16, is that a disciplinary decision after investigation is prior to the filing of grievances, and the union cannot transform a request for investigation and decision into a grievance. Furthermore, the AFL-CIO is wrong in its suggestion that insubordination is not typically a basis for suspension pending investigation. Although as here, the employer might determine after investigation that

Nothing in Title VII justifies a rule whereby an employer that acts responsibly, as BNSF did, should nonetheless bear liability for the acts of supervisors it corrects, with no adverse effect on the employment status of the plaintiff. The rule below would chill the necessary business practice of suspending without pay, Petr. Br. 40, as well as every other practice where supervisors exercise official authority subject to higher level review.[17] It merely begs the question to assert that supervisors should simply not discriminate in issuing suspensions (U.S. Br. 26; Resp. Br. 47), when in White's view whether a decision is discriminatory can be answered in most cases with assurance only by a jury verdict. The point is that employers will be powerfully deterred from engaging in beneficial practices if it means running substantial and unwarranted *risks* of liability and high litigation costs regardless of the ultimate outcome. See, *e.g.*, *Franchitti* v. *Bloomberg, L.P.*, 411 F. Supp. 2d 466, 467 (S.D.N.Y. 2006) (employer spends $1.3 million defending through a trial a former employee's Title VII claim that the trial judge found to be utterly baseless and fraudulent).

CONCLUSION

The judgment should be reversed.

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suspension was unwarranted, as a class of conduct insubordination — particularly insubordination in the field — is a serious infraction that often justifies suspension without pay pending investigation. *See, e.g.*, NRAB Second Div. Award No. 13830 (Apr. 1, 2005); NRAB Third Div. Award No. 32393 (Dec. 30, 1997) (available by search at www.nmb.gov).

[17] Temporary suspensions *with pay*, even if corrected, would apparently also create liability under White's proposed interpretation of *Ellerth* since they change employment status; the employee may experience some temporary adverse effects from being removed from service, *DeLaughter* v. *United States Postal Serv.*, 3 F.3d 1522, 1524 (Fed. Cir. 1993); and an employee may plausibly claim (and prove with only her testimony) emotional distress from even a paid suspension.

Respectfully submitted,

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April 7, 2006

APPENDIX

BNSF

[LOGO]

AGREEMENT

BETWEEN

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

AND ITS EMPLOYEES
REPRESENTED BY THE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

[LOGO]

Effective September 1, 1982

Updated December, 2002

Form 12619

* * * *

Rule 40. INVESTIGATIONS AND APPEALS

A. An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule.

B. In the case of an employe who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefor.

C. At least five (5) days advance written notice of the investigation shall be given the employe and the appropriate local organization representative, in order that the employe may arrange for representation by a duly authorized representative or an employe of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employe involved.

D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employe, with copy to local organization's representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employe. If not effected within five (5) calendar days, or if employe is called back to

service prior to completion of suspension period, any unserved portion of the suspension period shall be canceled.

E. The employe and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.

F. The investigation provided for herein may be waived by the employe provided that any discipline assessed is confirmed in writing in the presence of his duly authorized representative and agreed to by the proper officer of the Carrier.

G. If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.

H. The provisions of Rule 42 shall be applicable to the filing of claims and to appeals in discipline case. [See Appendix JJ for alternative expedited arbitration procedures]

I. The date for holding an investigation may be postponed if mutually agreed to by the Company and the employe or his duly authorized representative. If there is a change in the location of the investigation, the employe and his duly authorized representative will be notified.

J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employe shall be considered as having been dismissed.

K. If an employe who has been discharged for cause is later reinstated, without having been found blameless, and his former position has been bid in by another employe on regular bulletin, the reinstated employe will displace the youngest assigned man in his own rank, unless otherwise agreed between the General Chairman and the Company.

* * * *

Rule 42 TIME LIMIT ON CLAIMS

A. All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.

B. If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of the Company shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the Company designated for that purpose.

C. The requirements outlined in Sections A and B of this rule pertaining to appeal by the employee and decision by the Company, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Company to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless, within nine (9) months from the date of said officer's decision pro-

ceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3, Second, of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine (9) months' period herein referred to.

D. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

E. This rule recognizes the right of representatives of the Organization, party hereto, to file and prosecute claims and grievance for and on behalf of the employes it represents.

F. This Agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within nine (9) months of the date of the decision of the highest designated officer of the Company.

G. This rule shall not apply to requests for leniency.

* * * *